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IN THE

Supreme Court of the United States

October Term, 1968
No. 409

LOS ANGELES HERALD EXAMINER, a Division of the Hearst Corporation and THE SAN FRANCISCO EXAMINER, a Division of the Hearst Corporation,

Petitioners,

vs.

SAN FRANCISCO-OAKLAND NEWSPAPER GUILD; NEWSPAPER AND PERIODICAL DRIVERS' AND HELPERS' UNION LOCAL 921; LOS ANGELES NEWSPAPER GUILD, LOCAL 69; LOS ANGELES WEB PRESSMEN'S UNION NO. 18; LOS ANGELES STEREOTYPERS' UNION NO. 58; LOS ANGELES TYPOGRAPHICAL UNION NO. 174; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94; GENERAL WAREHOUSEMEN'S UNION LOCAL 598; BUILDING SERVICE AND MAINTENANCE EMPLOYEES UNION NO. 399; LOS ANGELES MAILERS' UNION NO. 9; and LOS ANGELES PAPER HANDLERS' UNION NO. 3, appellants in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondents,

RALPH E. KENNEDY, Regional Director of Region 21 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, appellee in proceedings before the United States Court of Appeals for the Ninth Circuit,

Respondent.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondents, San Francisco-Oakland Newspaper Guild, Newspaper and Periodical Drivers' and Helpers' Union Local 921, Los Angeles Newspaper Guild, Local 69, Los Angeles Web Pressmen's Union No. 18, Los Angeles Stereotypers' Union No. 58, Los Angeles Typographical Union No. 174, International Association of Machinists and Aerospace Workers, District Lodge No. 94, General Warehousemen's Union Local 598,

Building Service and Maintenance Employees Union No. 399, Los Angeles Mailers' Union No. 9, and Los Angeles Paper Handlers' Union No. 3, hereinafter referred to as "Respondent Unions", pray that the petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 20, 1968, denying petitioners leave to intervene, be denied.

Question Presented.

Where a district court, in proceedings instituted by the National Labor Relations Board pursuant to § 10 (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (1), issues a temporary injunction against a charged party and the charged party appeals therefrom, does the charging party have a right to intervene in the appeal proceedings?

Statute Involved.

Section 10 (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 160 (1), provides in relevant part:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b) or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf

of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *provided, further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. . . . Upon filing of any such petition the court shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony. . . ."

Statement of the Case.

On January 12, 1968 respondent Ralph E. Kennedy, Regional Director of Region 21 of the National Labor Relations Board, hereinafter referred to as "Respondent Regional Director", filed a petition for injunction under § 10 (1) of the National Labor Relations Act (29 U.S.C. § 160 (1)), in the United States District Court, Northern District of California, alleging

that petitioners herein had filed unfair labor practice charges with the National Labor Relations Board, charging that respondent unions were engaging in activity in violation of § 8 (b) (4) (i) (ii) (B) of the Act (29 U.S.C. § 158 (b) (4) (i) (ii) (B)), and further alleging that respondent Regional Director had reasonable cause to believe that respondent unions had engaged in the unfair labor practices charged. Following the filing of affidavits, the submission of memoranda of points and authorities by petitioners, respondent unions, and respondent Regional Director, and oral argument, the District Court, on February 7, 1968, issued an order granting the temporary injunction requested by respondent Regional Director, and on February 8, 1968, issued a supplemental order granting the temporary injunction requested by respondent Regional Director.

Respondent unions appealed to the Court of Appeals for the Ninth Circuit, seeking a reversal of the judgment of the district court. Petitioners, charging parties below, on April 17, 1968 filed a motion for leave to intervene in the proceedings. By an order dated April 19, 1968, the Court of Appeals granted petitioners leave to intervene in the appeal as appellees. On April 24, 1968, respondent unions and respondent Regional Director filed answers to petitioners' motion for leave to intervene and requests for reconsideration by the Court of Appeals of its order granting intervention. Petitioners were permitted to, and did, file a brief in opposition to the motions for reconsideration of the order granting intervention. On May 20, 1968, the Court of Appeals rescinded its order of April 19, 1968 so far as that order permitted intervention by petitioners, but deemed said order as an authorization for charging parties to appear and file a brief as *amici curiae*.

Reasons for Denying the Petition.

1. The order of the Court of Appeals denying petitioners leave to intervene in the appeal of the District Court's order granting a temporary injunction pursuant to § 10 (1) of the Act is not in conflict with this Court's decision in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 283 v. Scofield,* 382 U.S. 205 (1965).

In *Scofield,* this Court held that charging parties and charged parties in unfair labor practice proceedings before the National Labor Relations Board have a right to intervene in the court of appeals in proceedings reviewing an NLRB order under § 10 (e) and (f) of the National Labor Relations Act (29 U.S.C. § 160 (e) and (f)). Petitioners contend that the Ninth Circuit's order in this proceeding denying them the right to intervene in an appeal of an order issued by the District Court under § 10 (1) of the National Labor Relations Act is in conflict with this Court's decision in *Scofield,* and attempt to analogize proceedings under § 10 (1) to proceedings under § 10 (e) and (f). This Court, however, in *Scofield,* was careful to confine the scope of its ruling to the question of intervention in the courts of appeals in NLRB review proceedings under § 10 (e) and (f).

> "Lacking a clear directive on the subject, we look to the statutory design of the Act. Cf. *Scripps-Howard Radio v. Commission,* 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229. Of course, in considering the propriety of intervention in the courts of appeals, our discussion is limited to Labor Board review proceedings. Federal agencies are not fun-

gibles for intervention purposes—Congress has treated the matter with attention to the particular statutory scheme and agency. . . ." (382 U.S. at 210).

In *Scofield* this Court relied heavily upon the statutory scheme of § 10 (e) and (f), a statutory scheme wholly different from that contained in § 10 (1), and upon the fact that § 10 (f), unlike § 10 (1), provides that "any person aggrieved by a final order of the Board . . . may obtain a review of such order. . . ." Thus, this Court said:

> "In some instances, the words of the statute themselves elicit an answer. When the Board enters a final order against the charged party, it is clear that the phrase '[a]ny person aggrieved' in § 10 (f) enables him to seek immediate review in an appropriate Court of Appeals. Alternatively, if the Board determines that a complaint should be dismissed, the charging party has a statutory right to review as a 'person aggrieved'." (382 U.S. at 210).

Moreover, the rationale of this Court in *Scofield* in allowing intervention in review proceedings is wholly inapplicable to proceedings under § 10 (1) of the Act. As this Court pointed out, any party aggrieved by a Board order may seek review of that order and if a successful charging party or charged party is not allowed to intervene in the first appellate review proceeding, there is a possibility of a remand to the Board followed by a ruling against the previously successful party with the attendant possibility of a second appeal to the Court of Appeals by the party who was not per-

mitted to intervene in the original appellate review proceeding. Thus, denying intervention to a successful charging party or charged party in the first appellate review proceeding may lead to undesirable duplication of proceedings and "circuit shopping".

> "To allow intervention to the charged party in the first appellate review proceeding is to avoid 'unnecessary duplication of proceedings,' and to adhere to the goal of obtaining 'a just result with a minimum of technical requirements.' Analysis of the Act's machinery in practice so indicates. A decision of the reviewing court to set aside a Board order dismissing a complaint has the effect of returning the case to the Board for further proceedings. This normally results in the Board's entering an order against the charged party. From this remedial order, as noted, the charged party is aggrieved and may seek review. Judicial time and energy is then expended in pursuit of issues already resolved in the first appeal. Moreover, the second appeal could lead to undesirable 'circuit shopping' and useless proliferation of judicial effort. . . Permitting intervention in the first review thus centralizes the controversy and limits it to a single decision, accelerating final resolution. This is in accord with one of the objectives of the Labor Act—the prompt determination of labor disputes."
>
> *International Union, United Auto Workers v. Scofield,* 382 U.S. 205, 212-213.

And, as this Court noted:

> ". . . In the second review proceeding, if the now-successful charging party is denied interven-

tion and the appellate court takes a different view of the applicable law, the charging party might later have the opportunity to seek review again as a 'person aggrieved'. Thus, three or even more review proceedings could be engendered out of the failure to permit intervention at the most convenient stage—the initial review proceeding. . . ." (382 U.S. at 213, fn 6).

It is clear that the considerations which warrant intervention in review proceedings under § 10 (e) and (f) do not exist in proceedings under § 10 (1). Under § 10 (1) there is no possibility of duplication of proceedings which might result from the denial of intervention. If the charging parties are not permitted to intervene in the proceedings in a § 10 (1) appeal, and if there is a remand to the District Court with a subsequent ruling in favor of appellants, charging parties will not have the opportunity to review this ruling in a subsequent appeal, as would be the case under § 10 (e) and (f). The problem considered by this Court in *Scofield* was that charged parties and charging parties who were not allowed to intervene in the first appellate proceeding might subsequently be able to seek review themselves and thus relitigate the case. Under § 10 (1) a charging party who is not allowed to intervene could never subsequently have a right to bring an appeal himself and thus the case would not, and could not, be relitigated in a second appeal based on the same issues.

In short, the question of intervention in proceedings on a § 10 (1) appeal is an entirely different question from that considered by this Court in *Scofield* with respect to intervention in review and enforcement pro-

ceedings under § 10 (e) and (f). Thus, the order of the Court of Appeals denying intervention in the instant proceeding is not in conflict with this Court's decision in *Scofield*.

2. The order of the court below is consistent with the letter and spirit of § 10 (1) and with the intent of Congress in the Norris-LaGuardia Act and the National Labor Relations Act, and permits charging parties to participate in the § 10 (1) proceeding to the full extent intended by Congress.

In §§ 10 (j) and 10 (1) of the Act, Congress enacted a narrow exception to the prohibitions of the Norris-LaGuardia Act (29 U.S.C. § 101, *et seq.*), against temporary injunctive relief in labor disputes. This narrow exception was applicable only to proceedings by the administrative agency entrusted with the enforcement of the Act, the National Labor Relations Board.

As the Fourth Circuit pointed out prior to the passage of the Taft-Hartley amendments to the National Labor Relations Act:

> "Prior to the passage of the Norris-LaGuardia Act of March 23, 1932, 47 Stat. 70, 29 U.S.C.A. §101, et seq., the use of injunctions in labor disputes had been the subject of much bitter controversy; and the purpose and effect of that legislation was to deprive the federal courts of jurisdiction to interfere by injunction with labor disputes except in a very limited class of cases. The jurisdiction of the court over labor disputes was still further limited by the National Labor Relations Act of July 5, 1935, 49 Stat. 449, 29 U.S.C.A.

§151 et seq., which guaranteed the right of collective bargaining to employees engaged in industry affecting interstate commerce, defined unfair labor practices on the part of employers and set up the National Labor Relations Board to supervise collective bargaining and protect employees in the exercise of rights guaranteed by the Act from unfair labor practices on the part of their employers. It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that Act was 'to establish a single paramount administrative or quasi-judicial authority in connection with the development of federal American law regarding collective bargaining'; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."

Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d 183, 186 (4th Cir. 1948).

In *Bakery Sales Drivers Local Union No. 33 v. Wagshal,* 333 U.S. 437 (1948), this Court held that the Labor Management Relations Act of 1947 had removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, "only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party." (333 U.S. at 442).

As this Court said in *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 452, 517 (1955):

> "Congress explicitly gave such jurisdiction [to issue injunctions against unfair labor practices pending final adjudication by the Board] to the district courts only on behalf of the Board on a petition by it or 'the officer or regional attorney to whom the matter might be referred'. . . To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify."

Petitioners argue that § 10 (h) of the Act excepts all proceedings under § 10 from the provisions of the Norris-LaGuardia Act, and attempt to analogize the order of the Court of Appeals in enforcement proceedings with the temporary injunctive relief envisaged under § 10 (1). It is clear, however, that in § 10 of the National Labor Relations Act Congress carved out certain express exceptions to the provisions of Norris-LaGuardia. As the Fourth Circuit said in *Amazon Cotton Mill, supra,* quoting with approval the language of this Court in *General Committee v. Missouri K.T.R. Co.*, 320 U.S. 323, 332 (1943), and applying it to the National Labor Relations Act:

> "On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal ma-

chinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." (167 F. 2d at 186).

Clearly, the statutory scheme of § 10 (1) sets forth wholly different procedural rules from those established with respect to proceedings before the Board and subsequent review or enforcement proceedings. Section 10 (1) provides that the charging party shall be given an opportunity to appear by counsel and present any relevant testimony in the proceedings for a temporary injunction. It does not provide that the charging party may intervene in such proceedings or that he may become a party to the proceedings. Nor does it provide that the charging party, or any other person aggrieved by an order of the district court, may seek review of that order. Section 10 (f), however, provides that any person aggrieved by a final order of the Board may seek review in a Court of Appeal. Moreover, as this Court pointed out in *Scofield,* the charging party in the Board proceeding is accorded formal recognition; he participates in the hearing as a "party" and he may file exceptions to any order of the trial examiner. If Congress had intended that charging parties should have the right to intervene in § 10 (1) proceedings or in § 10 (1) appeals, it could have so provided. With respect to proceedings before the Board, Congress provided in § 10 (b), "In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." With re-

spect to review proceedings, as we have seen, Congress provided that any person aggrieved might seek review.

It was not by accident that Congress provided for varying degrees of participation on the part of charging parties in proceedings under § 10 of the Act. Although petitioners attempt to analogize the temporary injunction envisaged under § 10 (1) with the injunction issued by a court of appeals in enforcement proceedings, the injunctions are in fact wholly different and there are compelling reasons for providing for different degrees of participation by private litigants. The injunction contemplated under § 10 (e) of the Act follows a full hearing on the merits before the Board with all parties participating. In a § 10 (e) and (f) proceeding the findings of the Board must be supported by substantial evidence on the record considered as a whole. Section 10 (1) provides for interim relief, a temporary restraining order and/or a preliminary injunction after a preliminary investigation by the Board but prior to any hearing on the merits. The petitioning Regional Director under § 10 (1) must show only that there is reasonable cause to believe that a violation of the Act has occurred.

As Chief Justice Warren said in a dissenting opinion, joined by Justice Brennan and Justice Fortas, in *Walker v. City of Birmingham,* 388 U.S. 307, 330 to 331 (1967):

> "The *ex parte* temporary injunction has a long and odious history in this country, and its susceptibility to misuse is all too apparent. . . . As a weapon against strikes, it proved so effective in the hands of judges friendly to employers that Congress was forced to take the drastic step of

removing from federal district courts the jurisdiction to issue injunctions in labor disputes. The labor injunction fell into disrepute largely because it was abused. . . ."

Congress was fully aware of the "odious history" of the temporary injunction when it enacted § 10 (1). Thus, in providing for a temporary injunction with respect to certain alleged unfair labor practices prior to any hearing on the merits, Congress carefully restricted the conditions upon which an ex parte temporary restraining order could be issued and also expressly limited the rights of private litigants in the proceeding.

The "odious history" surrounding the temporary injunction granted prior to a hearing on the merits does not exist with respect to the type of injunction contemplated by § 10 (e), *i.e.*, a permanent injunction after full adjudication and full hearing on the merits of the dispute. Accordingly, the procedures and the rights of private parties under § 10 (1) are vastly different from those under § 10 (e) and (f).

To allow the charging party to intervene in a proceeding under § 10 (1) and become a full party in such a proceeding violates both the letter and the spirit of § 10 (1) and the intent of Congress in the Norris-La Guardia Act and the National Labor Relations Act. Congress has sought to preclude private parties from obtaining temporary injunctive relief in labor disputes and has entrusted only the Board with the authority to secure such interim relief where the Board has reasonable cause to believe that an unfair labor practice has occurred.

The right to intervene and become a full party in these proceedings carries with it many rights which Congress did not intend private litigants to have. Thus, if charging parties can intervene in the appeal, they would undoubtedly seek to intervene in the district court proceeding. Affording the charging parties the right to intervene and all of the rights of a party to the proceeding necessarily raises questions as to their right to appeal and as to their right to initiate contempt proceedings. It certainly was not the intent of Congress to allow a private litigant to appeal and seek an injunction from a higher court which it could not have sought nor obtained from the lower court. Nor could it have been the intent of Congress to entrust a private litigant with the right to initiate contempt proceedings based on violation of an injunction which it was legally proscribed from obtaining originally. Nor was it the intent of Congress to permit a charging party to dictate the course of litigation in § 10 (1) proceedings.

The decision of the Ninth Circuit denying petitioners the right to intervene in this proceeding properly limits the participation of private litigants in § 10 (1) proceedings to the extent intended and expressly provided for by Congress in § 10 (1); and it is consistent with the intent of Congress in the Norris-La Guardia Act and the National Labor Relations Act to severely restrict the use of the temporary injunction in labor disputes and to prevent private parties from either obtaining such injunctions or from dictating the course of litigation with respect to such injunctions.

3. The order of the court below is not in conflict with the decisions of other courts of appeal.

Petitioners contend that the order of the Ninth Circuit denying intervention herein is in conflict with the order of the Court of Appeals for the Second Circuit in *McLeod v. General Electric Co.*, 366 F. 2d 847 (2d Cir. 1966). However, there is neither a holding nor a discussion of the issue of intervention by the Second Circuit in *McLeod*. It is not clear whether the charging parties' intervention in that case was opposed nor whether the issue was litigated. It also appears that the question of intervention was not subsequently litigated on the petitions for writ of certiorari in the Supreme Court, 385 U.S. 533 (1967).

Moreover, the Second Circuit has previously considered the role of a charging party in a § 10 (1) proceeding, and like the Ninth Circuit, has held that the charging parties' role is a limited one. Thus, in *McLeod v. Business Machine and Office Appliance Mechanics Conference Board*, 300 F. 2d 237 (2d Cir. 1962), the Second Circuit rejected an argument raised by the charging party in a § 10 (1) proceeding, since the Regional Director had not relied upon this and had not alleged it. The Court analyzed in detail the rights of a charging party in proceedings under § 10 (1) and said:

> "The charging party, Rand, contends that handbills distributed are untruthful and, therefore, not protected by the 'publicity proviso.' Because the Regional Director has not relied upon this in his petition or argument, we believe the question governed not by section 10 (1), but by the Norris-LaGuardia Act. We lack jurisdiction, therefore, to

> grant relief. Section 10 (1) is operative only upon the filing of a petition by a Regional Director of the Board. This limitation was imposed in order to restrict the potential involvement of federal courts in labor disputes. . . . We are mindful of the fact the statute allows the charging party to appear by counsel and to present relevant testimony. We believe, however, the principal role in these proceedings is to be played by the Regional Director acting in the public interest, and while the charging party is free to aid him in the course of the litigation, the charging party may not substitute itself as the principal complainant." (300 F. 2d at 242-243).

NLRB v. Nashville Building & Construction Trades Council, 383 F. 2d 562 (6th Cir. 1967), also cited by the petitioners, involved three legal proceedings, all of which were before the Sixth Circuit. The three proceedings were an appeal of a temporary injunction granted by the district court under § 10 (1), a petition for writ of mandamus filed by the respondent union, and a petition for enforcement of the final NLRB order on the merits. The question of intervention in the § 10 (1) appeal was not decided or discussed by the Sixth Circuit. Although three proceedings were before the Sixth Circuit, that court noted at page 563, footnote 1, that the petition of the charging party to intervene in the enforcement proceedings was granted. The charging party did not intervene in the appeal of the injunction issued under § 10 (1) even though that proceeding was also before the court, and the Sixth Circuit was careful to specify that the charging party was intervening in the enforcement proceeding, citing *UAW v. Scofield, supra.*

Thus, there is certainly no clear conflict among the courts of appeal. The views of the Second and Sixth Circuits on this issue have not been expressed by those courts and are certainly not clearly defined; both courts have indicated that a charging party's role in § 10 (1) proceedings is a limited one. In any event, this question is not ripe for consideration by this Court in view of the lack of any clear expression of the view of other courts of appeal.

4. The question presented does not involve an important issue which this Court should decide. While petitioners correctly point out that 227 § 10 (1) injunction proceedings were filed in the district courts in fiscal 1965, it is important to note that of this number, together with 13 cases pending at the beginning of the year, 73 cases were settled, eight dismissed, 48 continued in an inactive status, 16 withdrawn, and nine were pending court action at the close of the year. Only 86 petitions went to final order in fiscal 1965.* Similarly, of the 18 petitions for temporary relief under § 10 (j) filed in fiscal 1965, only 13 went to final order in the district court.**

Undoubtedly, only a small percentage of these cases were appealed, and although petitioners contend that a court of appeals will have to face the issue of intervention each time an appeal is taken, it is far more likely that many charging parties will not seek to intervene in the proceedings. Thus, the question presented herein

*Thirtieth Annual Report of the National Labor Relations Board, at 146 (1966).

**Id., at 143.

will not arise with nearly the frequency suggested by petitioners, and, in fact, would more likely arise only infrequently.

Respondent unions respectfully submit that this petition does not present a particularly important federal question which should be settled by this Court and that the question presented is neither ripe for consideration at this time nor of sufficient import to warrant this Court's consideration.

Conclusion.

For the foregoing reasons, it is respectfully urged that the petition for writ of certiorari should be denied.

Respectfully submitted,

STEPHEN REINHARDT,
Attorney for Respondent Unions.

Of Counsel:
BODLE, FOGEL, JULBER and
REINHARDT,
GEORGE E. BODLE,
DANIEL FOGEL,
LESTER G. OSTROV,
BRUNDAGE & HACKLER,
DARWIN, ROSENTHAL & LEFF,
RICHMAN, GARRETT & ANSELL,
LEVY, DE ROY, GEFFNER & VAN BOURG.